

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

SECTION C

TIME

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I. CONSTITUTIONAL FOUNDATION

- A. U.S. Constitution, Article I, Section 8, Clause 1
- The power to tax and spend.
- B. U.S. Constitution, Article I, Section 8, Clause 16
- Organizing and training the militia.
- C. U.S. Constitution, Article I, Section 9, Clause 7
- No money spent except as a consequence of a lawful appropriation.

II. STATUTORY FOUNDATION

- A. 31 U.S.C. § 1552. An appropriation is available for obligation for a definite period of time, and it must be obligated during this period of availability. If it is not, the authority to obligate expires.
- B. The Annual Appropriations Acts.
- C. 31 U.S.C. § 1341(a)(1)(B). Funds may not be obligated prior to signature of the Appropriations Act and receipt of the funds from the Office of Management and Budget through higher headquarters.
- D. 31 U.S.C. § 1301. Appropriations are available for obligation during the year in which they are appropriated. Funds are presumed to be available for obligation for one year.
- E. 31 U.S.C. § 1502. Funds may not be obligated after the expiration of their period of availability.

**OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE**

AVAILABILITY OF APPROPRIATIONS AS TO TIME

III. REGULATORY FOUNDATION

- A. National Guard Pamphlet 37-1, Financial Management.
- B. Army Regulation 37-1, Army Accounting and Fund Control (30 Apr. 1991).
- C. Air Force Regulation 177-16.

IV. PERIOD OF AVAILABILITY FOR VARIOUS APPROPRIATIONS

- A. Operation & Maintenance (O&M) Funds - 1 year.
- B. Research, Development, Test & Evaluation (RDT&E) Funds - 2 years.
- C. National Guard & Reserve Equipment - 3 years.
- D. Procurement Funds - 3 years.
- E. Construction - 5 years.
- F. Stock and Industrial Funds - Indefinite (No Year).
- G. Multi-Year - Varies up to five years depending on the program. The Defense Department receives a variety of special purpose appropriations, some of which are available for more than one year. For example:
 - (1) O&M, Humanitarian Assistance -- 2 years; and
 - (2) O&M, Goodwill Games -- 2 years.

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

V. FUNDING REPLACEMENT CONTRACTS.

A. Policy.

1. There are three important exceptions to the general prohibition on obligating funds after the period of availability.
2. The law in this area is now settled as a result of OSD Comptroller policy changes. The OSD Comptroller on at least one prior occasion directed that reprourement contracts awarded after a termination for default must be funded with current appropriations. This policy is now rescinded.

B. Protests to GAO.

1. "[F]unds available to an agency for obligation for a contract at the time a protest is filed in connection with . . . award of such a contract shall remain available for obligation for 90 working days after the date on which the final ruling is made on the protest." This authority is limited to protests filed at the GAO or in a court. 31 U.S.C. § 1558.
2. This statutory provision was incorporated at FAR 33.102(b). 55 Fed. Reg. 55,782 (1990), (Federal Acquisition Circular 90-3).

C. Terminations for Default.

1. Terminations for Default: If a contract or order is terminated for default, and ~~abona~~ bona fide need still exists for the supplies or services, the original funds remain available for obligation for a reprourement, even if they would otherwise have expired. The reprourement contract must be

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

entered into without undue delay and must be for substantially the same item or service. AR 37-1, para. 9-5(e), citing, Louis W. Rosine Co., 55 Comp. Gen. 1351 (1976); See also Funding of Replacement Contracts 60 Comp. Gen. 591 (1981).

2. To the extent that additional funds are required for the replacement contract, and the funds have otherwise expired, the original year's funds may be used to fund the additional cost. Louis W. Rosine Co., 55 Comp. Gen. 1351 (1976); See also Funding of Replacement Contracts 60 Comp. Gen. 591, 594 (1981). This position is based upon an extension of the bona fide need analysis used by the Comptroller General in the Louis W. Rosine Co. decision.

D. Termination for Convenience of the Government.

1. The general rule is that a prior year's funding obligation is extinguished upon termination of a contract for convenience, and funds do not remain available to fund a replacement contract in a subsequent year where a contracting officer terminates a contract for the convenience of the government.
2. An important exception to this rule was adopted by the Comptroller General in Funding of Replacement Contracts, 68 Comp. Gen. 158 (1988), and Navy, Replacement Contract, 70 Comp. Gen. 230 (1991), 91-1 CPD para. 117. Funds originally obligated in one fiscal year for a contract that is later terminated for convenience in response to a court order or to a determination by the General Accounting Office or other competent authority that the award was improper.

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

3. This authority was expanded in 1991 to include terminations for convenience resulting from a contracting officer's determination that the award was clearly erroneous.
4. If the original award is determined to be improper and the contract is terminated for convenience, either by the contracting officer or as the result of an order by a judicial body, the funds originally obligated remain available in a subsequent fiscal year to fund a replacement contract, subject to the following conditions:
 - a. The original award was made in good faith;
 - b. The agency has a continuing bona fide need for the goods or services involved;
 - c. The replacement contract is of the same size and scope as the original contract;
 - d. The replacement contract is executed without undue delay after the original contract is terminated for convenience; and
 - e. If the termination for convenience is based upon the contracting officer's determination that the original award was improper, the contracting officer must execute a written determination stating the factual and legal basis for the conclusion that the award was improper.

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

VI. LIMITATIONS BASED UPON THE BONA FIDE NEED RULE.

A. Statutory Basis.

1. The statutory basis: "[t]he balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law." 31 U.S.C. § 1502(a).
2. Appropriated funds may only be obligated for properly incurred expenses. That is, the requirement must be abona fide need of the requiring activity arising during the period of availability of the funds proposed to be used for the acquisition. See Magnavox - Use of Contract Underrun Funds, B-207453, September 16, 1983, 83-2 CPD para. 401; To the Secretary of the Army 33 Comp. Gen. 57 (1953).
3. The bona fide needs rule applies only to appropriations with limited periods of availability for obligation.

B. Practical Considerations.

1. A bona fide needs inquiry focuses on the timing of the obligation of funds and whether that obligation is for a current need of the government.

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

2. The needs of the government and the nature of a product or service determine when bona fide need arises.
3. The term "bona fide need" has meaning only in the context of a fiscal law analysis. Bona fide needs analysis is separate and distinct from an analysis of contract specifications and whether or not they are a legitimate expression of the government's minimum needs.
4. Determining the bona fide need for an acquisition requires the application of judgment.
5. Each bona fide need determination is fact-specific.
6. Bona fide need is determined at the time of an obligation of the appropriated funds.

C. Bona Fide Need Rule Applied to Supply Contracts.

1. Generally, bona fide need is determined by the date the government actually requires the supplies being acquired, i.e., when the government actually will be able to use the items.
2. Accordingly, funds are obligated for the fiscal year in which the supplies will be delivered for use. To Chairman, United States Atomic Energy Commission, 37 Comp. Gen. 155 (1957); To Betty F. Leatherman, Department of Commerce 44 Comp. Gen. 695 (1965); To Administrator, Small Business Administration, 44 Comp. Gen. 399 (1965).

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

3. Supply needs of a future fiscal year are the bona fide need of the subsequent fiscal year, unless an exception applies. Two recognized exceptions are: the lead-time exception and the stock level exception.
4. Lead-time exception to the bona fide need rule: It is appropriate to take into consideration the normal production lead-time in determining the bona fide need for an acquisition.
 - a. For example, if the normal lead-time between order and delivery of an item is 45 days, an obligation of Fiscal Year 1995 funds is appropriate for a delivery on or before 15 November 1995. (Remember 1 October 1995 is the beginning of Fiscal Year 1996.) This is a bona fide need of Fiscal Year 1995. If delivery after 15 November 1995 is permitted by the government, there is no bona fide need for the item in Fiscal Year 1995, because the necessary lead-time prior to delivery permits the item to be ordered and delivered in FY 1996.
 - b. If the government establishes a delivery date for an item and that delivery date is both beyond the normal lead-time and in the next fiscal year, funds for the next fiscal year must be used. In the example above, if delivery is permitted after 15 November 1992, Fiscal Year 1993 funds must be used.
5. Stock level exception to the bona fide need rule: It is also appropriate to purchase sufficient supplies necessary to maintain adequate and normal stock levels.

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

- a. For example, a contract to maintain the normal, authorized stock levels of repair parts may be awarded in September 1992, and requiring delivery in September 1992, using FY 1992 funds, even if it is known that the repair parts will not be used until early October 1992.
- b. Current year funds may be used to replace stock consumed in the current fiscal year, even though the replacement stock may not be used until the following fiscal year.
- c. Fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited.

D. Bona Fide Need Rule Applied to Service Contracts.

- 1. General rule: A bona fide need for services does not arise until the services are rendered. Theodor Arndt GmbH & Co, B-237180, January 17, 1990, 90-1 CPD para. 64; EPA Level of Effort Contracts, 65 Comp. Gen. 154 (1985). Thus, service contracts generally cannot cross fiscal years and must be funded with dollars available for obligation on the date the services are performed.
- 2. Nonseverable service exception: If the services produce a single or unified outcome, product, or report, the services may be regarded as being nonseverable. If so, the entire effort may be funded with dollars available for obligation at the time the contract is executed, and the contract may cross fiscal years. Proper Appropriation for Expenses Relating to Nonseverable Service Training Course B-233242, August 3, 1989; Acumenics Research and Technology,

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

Inc. - Contract Extension B-224702, August 5, 1987, 87-2 CPD para. 128; Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, 65 Comp. Gen. 741 (1986).

3. Statutory exception to the bona fide need rule concerning services: There are statutory exceptions to the general rule that contracts for severable services are the bona fide need of the fiscal year in which the services are performed. 10 U.S.C. § 2410a. Contracts for a period not to exceed 12 months for the following purposes, may be awarded at any time during the fiscal year, and they may be completely funded with current appropriations:
 - a. Maintenance of tools, equipment and facilities;
 - b. The lease of real or personal property, including the maintenance of the property, when contracted for as part of the lease agreement;
 - c. Depot maintenance; and
 - d. Operation of Equipment. Section 342, National Defense Authorization Act For Fiscal Years 1992 and 1993, Pub. L. No. 102-190.

E. Bona Fide Need Rule Applied to Training Contracts.

Training courses that begin on or about the first of October may be paid for with the prior year's appropriation if the scheduling of the course is beyond the control of the agency and the time between award of the contract and performance is not excessive. Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course 70 Comp. Gen. 296 (1991).

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

- F. Bona Fide Need Rule Applied to Maintenance and Repair Contracts.
1. Current funds may be obligated for maintenance and repair contracts near the end of the fiscal year, even if performance may not begin until the next fiscal year. AR 37-1, Table 9-2, fn. 5.
 2. This authority is limited to the following situations:
 - a. The requirement must represent bona fide need of the current fiscal year;
 - b. The contract must contain a specific provision requiring that the work must actually start on or before January 1 of the following calendar year, except in contracts with a foreign government or contracts entered into pursuant to a binding international agreement.
 - c. Commencement of work is evidenced by:
 - (1) Physical on-site evidence based upon a visual inspection; or
 - (2) Documentary evidence of costs incurred must be considered when planning for outdoor construction or renovation projects. A project that cannot reasonably be expected to commence before the onset of winter weather is not the bona fide need of the prior Fiscal Year. For example, a contract for paving 18 kilometers of roads in Fairbanks, Alaska, probably should not be awarded on 30 September 1992 and funded with Fiscal Year 1992 dollars.

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

- d. If mission requirements make it impossible to allow the commencement of the work until 15 December, the requirement is not the bona fide need of the prior fiscal year.
- e. Factors within the government's control are most important in determining bona fide need. Cf. Theodor Arndt GmbH & Co, B-237180, January 17, 1990, 90-1 CPD para. 64 (agency decision to wait until Fiscal Year 1990 to award a service contract, with performance commencing on 15 October 1989, is correct where services are not needed until that date). In analyzing the bona fide need for a given item, the following factors are appropriate for consideration:
 - (1) The required delivery date in the contract;
 - (2) The normal rate of consumption;
 - (3) The date when the government is making facilities, sites, or tools available; and
 - (4) The degree of actual control the government has over the date that work may be commenced. For example, if a legal office will not be available for renovation until 25 December 1995 because a brigade is deploying on the 20th of December and cannot be disrupted between 1 October and 20 December, and if the normal lead-time for starting a renovation project of this type is 15 days, the renovation is a bona fide need of Fiscal Year 1996 because the contract could be awarded in FY 1996 and

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

performance could commence by the time
that the brigade vacated the building.
Accordingly, use of Fiscal Year 1995
funds violates the bona fide need rule.

3. These principles apply to Job Order contracts entered into under the authority of AFARS 17.9000. AR 37-1, Table 9-2, fn. 6.

VII. MULTIPLE YEAR FUNDS AND MULTIPLE YEAR CONTRACTS.

A. Introduction.

1. See Hill, The Dollars and "Sense" of Government Contract Funding (American Bar Association, Public Contract Law Section Monograph, 1988), Chapter 2.
2. Multiple Year Funds and Multiple Year Contracts.
 - a. There is a clear separation between fiscal law and contract law as it relates to multiple year appropriateness. Proper analysis requires that the fiscal law issues be considered separately from the contractual form.
 - b. The law governing multi-year contracting and contracts containing options is beyond the scope of this course and will not be considered.

B. Basic Concepts.

1. The annual DoD Appropriations Act typically contains the following provision:

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year, unless expressly provided herein. E.g., Pub. L. No. 103-335, Section 8003, 108 Stat. 2617 (1994).

2. Multiple year appropriations are those appropriations which expressly provide that they remain available for obligation for a definite period in excess of one fiscal year. Title 7, Fiscal Guidance, Chapter 2, Paragraph 2.1.C.1.b., GAO's Policy and Procedures Manual for Guidance of Federal Agencies (Feb. 12, 1990); Section 21.1, Office of Management and Budget Circular A-34, Instructions on Budget Execution (August 1985).
3. The multiple year appropriations usually provided to the Department of Defense include:
 - a. O&M, Humanitarian Assistance -- 2 years.
 - b. O&M, Goodwill Games -- 2 years.
 - c. National Guard & Reserve Equipment -- 3 years.
 - d. Procurement Appropriations -- 3 years.
 - e. Shipbuilding and Conversion, Navy -- 5 years, except that certain obligations may be incurred for longer periods.
 - f. Research, Development, Test and Evaluation (RDT&E) Appropriations-- 2 years.
 - g. Chemical Agents and Munitions Destruction, Defense -- various periods.

**OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE**

AVAILABILITY OF APPROPRIATIONS AS TO TIME

- h. Military Construction Appropriations -- 5 years.
 - 4. The language typically used by the Congress is ".... to remain available for obligation until September 30, XXXX." See Defense Technical Information Center -- Availability of Two Year Appropriations, 68 Comp. Gen. 170 (1989).
- C. Statutory Controls.
- 1. The Bona Fide Need Rule, 31 U.S.C. § 1502(a), applies to multiple year appropriations. Defense Technical Information Center -- Availability of Two Year Appropriations, 68 Comp. Gen. 170 (1989); Chairman, Committee on Appropriations, House of Representatives, 55 Comp. Gen. 768 (1976). A multiple year appropriation may only be expended for obligations properly incurred during the period of availability. Therefore, the FY 1990 RDT&E, Army Appropriation, which is available for obligation until September 30, 1991, may be obligated for the needs of FY 1990 and FY 1991. It is not available for the needs of FY 1993.
 - 2. The exceptions to the bona fide need rule relating to acquisitions to maintain stock levels and lead time for special goods also apply. This statutory rule is limited by administrative policies discussed later.
- D. Administrative Controls: Program Objectives.
- 1. Procurement appropriations: Program managers using procurement appropriations want to have all the necessary funding in hand before they obligate funds on a procurement contract. Having all of

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

the funds helps to ensure stable production runs and lower costs.

2. RDT&E appropriation: Program managers using RDT&E want to dribble out funding among various programs, giving more to those programs showing progress and withholding from those programs going nowhere.
3. The managers of procurement appropriations and RDT&E appropriations have diametrically opposed outlooks on funding programs within their purview. These philosophies result in two different funding policies.

E. Full Funding Policy.

1. DoD Directive 7200.4, Full Funding of DoD Procurement Programs (Sept. 6, 1983), describes the full funding policy as follows:

At the time of contract award, funds are available to cover the total estimated cost to deliver the contract quantity of complete, militarily usable items. If a future-year appropriation is required for delivery of the end items, the contract is not fully funded. See AFR 172-1, vol. 1, ch. 8.

2. The purpose of the full funding policy is to ensure that the amount requested each year will buy a specific quantity of end items. Absent this policy, agencies might conceal the total cost of an end item by splitting the costs among fiscal years, or otherwise budgeting for end items piecemeal.
3. Full Funding and Contract Terms.

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

- a. Full funding is primarily a budgeting concept. An agency may initiate an acquisition for a procurement item only if the funds for the total estimated cost of the program quantity are available for obligation.
 - b. The acquisition, however, need not be for the total quantity, nor for usable end items. Para. E.6., DoD Dir. 7200.4, Full Funding of DoD Procurement Programs (Sept. 6, 1983). Thus, for example, the annual procurement quantity may be divided among several contracts. Similarly, several contracts may be awarded with the product of some contracts, not militarily usable end items, provided to other contractors as GFE for incorporation into the end item. Only if a future-year appropriation is required for delivery of usable end items, is the program not fully funded.
4. Efficient production dictates two general exceptions to full funding policy. DoD Dir. 7200.4, Full Funding of DoD Procurement Programs (Sept. 6, 1983).
- a. Advanced procurement for long lead-time items allows acquisition of components, material, parts, and effort in an earlier fiscal year than that in which the related end item will be acquired.
 - b. To be eligible for advanced procurement, long lead-time items must have a significantly longer lead-time than other items. The cost of the advanced procurement items must be relatively small when compared to the remaining costs of the end item. An annual

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

budget request must include at least the estimated termination liability for long lead-time item procurements. The advanced procurement is for one fiscal year's program increment.

- c. Advanced economic order quantity (EOQ) procurement for multi-year procurement allows the agency to acquire components, materials, and parts for up to five fiscal years' program increment to obtain the economic advantage of multi-year procurements. The advanced procurement may obligate the termination costs, or the entire cost, if cheaper. EOQ costs may also be included in an unfunded cancellation clause.
- d. Full funding and Title 31 U.S. Code. The DoD full funding policy is not statutory. Violations of the full funding policy do not violate the Anti-Deficiency Act. Newport News Shipbuilding and Drydock Co., 55 Comp. Gen. 812, 822 (1976); 76-1 CPD para. 136 (option exercise valid, despite violation of full funding policy, because obligation did not exceed available appropriation).

F. Incremental Funding Policy.

- 1. The Research, Development, Test and Evaluation Program is executed by incrementally funding contracts and other obligations. AR 70-6, Management of the Research, Development, Test, and Evaluation, Army Appropriation(16 June 1986), para. 2-2; AFR 170-8, para. 8.
- 2. The incremental funding policy budgets an amount for each fiscal year sufficient to cover the obligations expected during that fiscal year.

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

Each contract awarded limits the government's obligation to the costs estimated to be incurred during the fiscal year. Funds for succeeding years are obligated during later years. The purpose behind the incremental funding policy is to maintain very close control over R&D programs by limiting their funding.

3. Contract Provisions.
 - a. An incrementally funded cost reimbursement contract contains FAR 52.232-22, Limitation of Funds. This provision limits the government's obligation to the funds allotted to the contractor. The contract also typically contains a schedule for providing funding. Typically, the contractor promises to manage its costs, so as to perform the contract until the next increment is provided.
 - b. Incrementally funded fixed price contracts use a similar clause, Limitation of Government's Obligation, pursuant to a FAR class deviation. See DA MSG, SARD-KP, 032015Z Jul 90, SUBJ: Approved Deviation.
 - c. Funds are allotted to the contract by an administrative modification identifying the funds.
 - d. To prevent funding gaps associated with late appropriations, the contracting officer may fund contract performance for 90 days into the next fiscal year with the current year's appropriation. AR 70-6, para. 2-2.b.(4).

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

AVAILABILITY OF APPROPRIATIONS AS TO TIME

4. Incremental funding, for management purposes, transforms 2 year RDT&E appropriations into 1 year funds. Legally, however, RDT&E appropriations may be obligated during their second year of availability. Frequently, agencies receive permission from the appropriation manager to obligate funds during the second year where problems prevent obligating an annual increment during the first year.

VIII. CONCLUSION